Office Supreme Court, U.S.
FILED
APR 15 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS, REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAX MALIN
1250 Federal Bar Building
Washington, D. C. 20006

RUTH WEYAND
1346 Connecticut Ave., N.W.
Washington, D. C. 20036

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Constitutional provisions and statutes involved	7
Statement	8
Origins of the dispute	8
Contract negotiations and mediation prior to passage of Public Law 88-108	10
Proceedings before Arbitration Board No. 282	15
The award of Arbitration Board No. 282	16
Proceedings in the courts below	20
Reasons for granting the writ	23
I. The unprecedented questions of constitutional law and federal statutory law require resolution by this Court for the protection of 200,000 railway workers and for the protection of the basic freedom of our system of labor relations	23
II. Public Law 88-108 has been construed and applied to destroy bargaining rights and property rights in violation of due process	27
III. This case presents important questions of statutory construction which should be decided by this Court	36
IV. The exercise of this Court's supervisory power is needed in this case to require compliance in the courts below with 28 U.S.C. § 2282	38
Conclusion	39

Page

Appendix A. Article I and the Fifth Amendment to the Constitution of the United States 1a

Appendix B. Public Law 88-108 ..... 1a

Appendix C. Railway Labor Act 5a

Appendix D. Section 13 of the Railway Labor Act of 1926 ..... 17a

Appendix E. 28 U.S.C. § 1254, together with legislative predecessors 18a

Appendix F. 28 U.S.C. § 2282 ..... 20a

Appendix G. Administrative Procedure Act 20a

Appendix H. Opinion in Court of Appeals 25a

Appendix I. Judgment of Court of Appeals 29a

CITATIONS

CASES:

Arizona v. California, 373 U.S. 546 (1963) 28

Austin Mailers Union v. Newspapers, Inc., 5th Cir., 1963, 55 L.R.R.M. 2693 26

Becker v. State, 7 W. W. Harr., Del. 454, 185 Atl. 92 (1936) 34

Best Foods, Inc. v. United States, Customs Ct., 3d Div., 218 F. Supp. 576 (1963) 34

Boston Printing Pressmen's Union v. Potter Press, 1st Cir., 1957, 241 F.2d 787, certiorari denied, 355 U.S. 817 26

Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad, 372 U.S. 284 (1963) 10

Brotherhood of Locomotive Enginemen and Firemen v. Certain Carriers, petition for a writ of certiorari pending, No. 935, O.T. 1963 2

Buffalo & Erie Ry. Co., Matter of, 250 N.Y. 275, 165 N.E. 291 (1929) 26

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 34

Colorado-Wyoming Co. v. F.P.C., 324 U.S. 475 (1942) 34

Page

Edwards v. Capital Air Lines, 176 F. 2d 755 (App. D.C., 1949) 32
Florida v. United States, 282 U.S. 194 (1931) 34
Group Health Ins. v. Howell, 40 N.J. 437, 193 A. 2d 192 (1963) 34
Harmon v. Brucker, 355 U.S. 579 (1958) 35
I.C.C. v. Mechling, 330 U.S. 567 (1947) 34
Johnson v. Michigan Milk Marketing Board, 295 Mich. 644, 295 N.W. 346 (1940) 34
Kent v. Dulles, 357 U.S. 116 (1958) 28
Michigan Milk Marketing Board v. Johnson, 295 Mich. 644, 295 N.W. 346 (1940) 34
N.L.R.B. v. Radio & Television Engineers Union, 364 U.S. 573 (1961) 28
Nixon v. Condon, 286 U.S. 73 (1932) 32
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 28
Sage v. Wilcox, 6 Conn. 81 (1826) 37
St. Joseph Stockyards v. United States, 298 U.S. 38 (1936) 36
Schechter Poultry Co. v. Ryan, 295 U.S. 495 (1935) 28
S.E.C. v. Chenery Corp., 318 U.S. 80 (1943) 34
State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Calif. 2d 436, 254 P. 2d 29 (1953) 34
State ex rel. Everett Fire Fighters v. Johnson, 46 Wash. 2d 114, 278 P. 2d 662 (1955) 28
Sunbeam Corp. v. Richardson, D.C. W.D. Ky., 144 F. Supp. 583 (1956) 34
Transport Workers Union v. Circuit Judge, 322 Mich. 332, 34 N.W. 2d 71 (1948) 28
United States v. B. & O. Railroad Co., 293 U.S. 454 (1935) 34
United States v. Carolina Carrier Corp., 315 U.S. 475 (1942) 34
Van Riper v. Traffic Tel. Workers' Fed. of New Jersey, 2 N.J. 385, 66 A. 2d 616, 9 A.L.R. 2d 854 (1949) 28
Wilson v. New, 243 U.S. 332 (1917) 25, 26
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 28

Page

CONSTITUTIONAL PROVISIONS AND STATUTES:

Administrative Procedure Act, 5 U.S.C. § 1001, 60 Stat. 237 ..... 6, 7, 20, 22, 20a
Section 2 ..... 20a
Section 5 ..... 21a
Section 7 ..... 35, 22a
Section 9 ..... 22a
Section 10 ..... 22a
Section 12 ..... 24a

Constitution of the United States
Article I 3, 4, 6, 7, 27, 1a
Fifth Amendment 3, 4, 6, 7, 27, 1a

Declaratory Judgments Act, 28 U.S.C. § 2201 20

Judiciary Act of 1925, 43 Stat. 936
Section 128 ..... 18a
Section 240 ..... 18a

Public Law 88-108, 45 U.S.C.A. Supp., 1963, § 157, 77 Stat. 132 ..... 3, 4, 6, 7, 10, 12, 15, 21, 26, 27, 28, 30, 36, 38, 1a
Whereas Clauses 1a
Section 1 ..... 7, 17, 2a
Section 2 ..... 17, 2a
Section 3 ..... 30, 3a
Section 4 ..... 7, 15, 17, 20, 22, 37, 3a
Section 5 ..... 4a
Section 6 ..... 4a
Section 7 ..... 4a
Section 8 ..... 17, 4a
Section 9 ..... 5a

Railway Labor Act of 1926, 44 Stat. 577
Section 13 ..... 3, 7, 17a

Railway Labor Act, 45 U.S.C. § 151, *et seq.*, 44 Stat. 577, 48 Stat. 1185 ..... 3, 7, 11, 20, 30, 5a
Section 2 ..... 30, 5a
Section 3 ..... 6a
Section 6 ..... 9a
Section 7 ..... 9a
Section 8 ..... 13a
Section 9 ..... 3, 20, 15a
Section 10 11

Page

28 U.S.C. § 1254 (1), 62 Stat. 928 ..... 3, 7
28 U.S.C. § 1337 20
28 U.S.C. § 2282 (62 Stat. 968) 7, 38, 39, 20a
28 U.S.C. § 2680 (62 Stat. 992) 19a

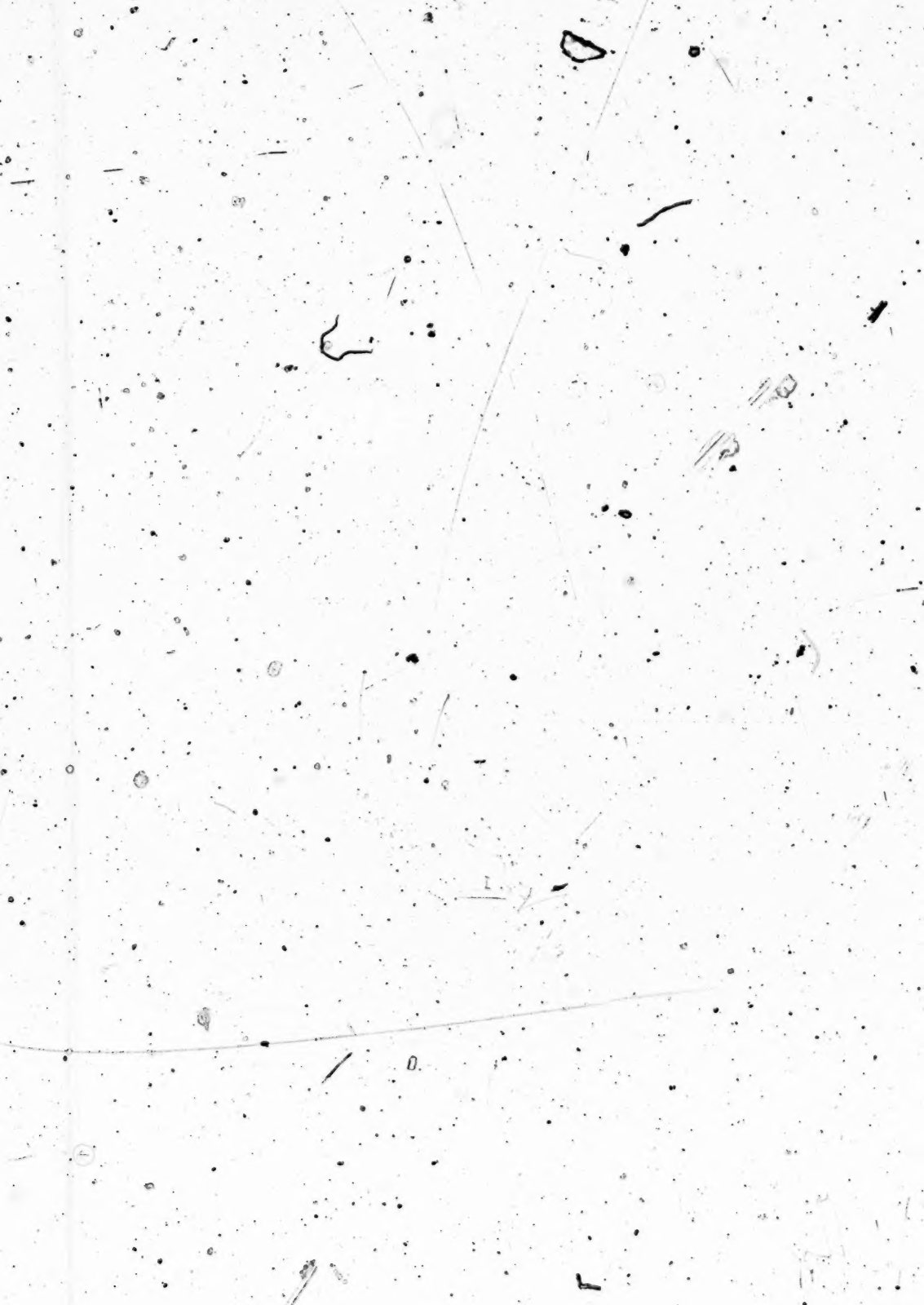
28 U.S.C. (1940 ed.) § 347
Section 347 ..... 18a, 19a
Section 348 ..... 19a

LEGISATIVE MATERIALS:

109 Daily Cong. Rec. 15277 13
15283 13
15292 37
15293 37
Hearings before Senate Committee on S.J. Res. 102, 88th Cong., 1st Sess., p. 465 15
H. Rep. No. 308, 80th Cong., 1st Sess., on H.R. 3214, p. A236 3
H. Rep. No. 713, 88th Cong., 1st Sess., p. 14 37
S. Rep. No. 459, 88th Cong., 1st Sess., pp. 7, 10 ..... 13, 36

MISCELLANEOUS:

American Jurisprudence, vol. 20, secs. 686, 695 35
Benewitz, Maurice C., Grievance Arbitration Experience as a Guide to Compulsory Arbitration Expectations, 14 Lab. L.J. 790 (Sept., 1963) 25
Corbin on Contracts (1963), vol. 1, p. 20 37
Fleming, R. W., The Search for a Formula, in I. Bernstein, H. L. Enarson, R. W. Fleming (eds.) Emergency Disputes and National Policy, New York, Harper's & Bros., 1955, pp. 211-213 25
The Peaceful Settlement of Disputes Over Contract Terms in Symposium: Arbitration and the Courts, 58 N.W.U.L. Rev. 466, 559 (Sept.-Oct., 1963) 26



IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, SOUTHERN PACIFIC COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, ROCK ISLAND, & PACIFIC RAILROAD COMPANY, THE COLORADO AND SOUTHERN RAILWAY COMPANY, THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, GREAT NORTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, ATLANTIC COASTLINE RAILROAD, RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, GULF, MOBILE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, THE FORT STREET UNION DEPOT COMPANY, JACKSONVILLE TERMINAL COMPANY, GEORGIA RAILROAD, THE PENNSYLVANIA RAILROAD, THE BALTIMORE & OHIO RAILROAD COMPANY, CENTRAL VERMONT RAILWAY, INC., DETROIT TERMINAL RAILROAD COMPANY, MONON RAILROAD, THE WASHINGTON TERMINAL COMPANY, individually and as representative of certain other carriers, RALPH T. SEWARD, individually and as representative of Arbitration Board No. 282, ROBERT F. KENNEDY as Attorney General of the United States, and the UNITED STATES, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Brotherhood of Locomotive Engineers prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 20, 1964, Court of Appeals Nos. 18,333 and 18,334.[1]

OPINIONS BELOW

The per curiam opinion of the Court of Appeals and the opinion of Judge J. Skelly Wright, concurring in part and dissenting in part, have not yet been officially reported and are printed in Appendix H, *infra*, pp. 25a-28a. They are unofficially reported at 55 LRRM 2517. The decision of the district court is reported in 225 F. Supp. 11 (1964) and is printed in the Consolidated Joint Appendix (JA 368 *et seq.*).[2]

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1963 (R. 690), and is printed in Ap-

[1] By an order entered January 16, 1964, the Court of Appeals consolidated these two cases with case numbers 18,331 and 18,332, brought by the Brotherhood of Locomotive Firemen & Enginemen, *et al.*, against the same respondents (R. 410). The consolidation was for all purposes (R. 410). A petition for a writ of certiorari in these other cases is before this Court in No. 935.

[2] "JA" denotes the "Consolidated Joint Appendix" as filed in the Court of Appeals. One certified and nine uncertified copies have been filed with the Clerk of this Court in Case No. 935. "Tr." denotes the transcript of testimony before Arbitration Board No. 282 which, together with the exhibits there introduced, has been filed with the Clerk of this Court in Case No. 935. "R" denotes the record certified by the Clerk of the Court of Appeals and filed in this Court as the record in the instant case.

pendix I, *infra*, p. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[3]

QUESTIONS PRESENTED

1. Whether, upon a Congressional finding that emergency measures were necessary to prevent a threatened interruption of essential transportation service as a consequence of a dispute concerning future terms and conditions of employment, a federal statute, Public Law 88-108, as construed and applied, was consistent with Article I and the Fifth Amendment to the Constitution of the United States in terminating the right of the disputing parties to economic self-help and in compelling them to accept the determinations of an *ad hoc* board, consisting mainly of some of the contending parties, as to the extent to which their existing agreements and the existing seniority rights of employees should be abrogated and as to the terms and conditions which should govern their relations for a term of years thereafter, the said board claiming

[3] Judge Wright, in his separate opinion below, expressed the view that Section 9 of the Railway Labor Act foreclosed review by this Court of judgments of the Court of Appeals in proceedings to impeach arbitration awards (*infra*, p. 28a). However, the legislative history of 28 U.S.C. § 1254(1) establishes that it empowered this Court to review such judgments. Section 13 of the Railway Labor Act as enacted in 1926 amended the Judicial Code to make judgments entered by circuit courts of appeals in Section 9 proceedings reviewable by certiorari (pp. 17a-18a, *infra*). The 1940 amendments to the Judicial Code listed Section 9 of the Railway Labor Act among the sections under which cases in the circuit courts were reviewable by certiorari (p. 19a, *infra*). In the 1948 amendments to the Judicial Code (p. 19a, *infra*), listing of specific sections was dropped because Section 1254 "applies to any case in the circuit court of appeals." H. Rep. No. 308, 80th Cong., 1st Sess., on H.R. 3214, p. A236. Hence 28 U.S.C. § 1254(1) empowers this Court to review by certiorari all issues in this case.

and exercising the authority and discretion, in making these determinations, to depart radically from existing terms and conditions and those under consideration in negotiations and mediation.

2. Whether, consistently with Article I and the Fifth Amendment to the Constitution of the United States, in federal compulsory arbitration legislation to settle a dispute over the content of a prospective private agreement and in an award under such legislation, alterations of the pre-existing rights of the parties may be imposed beyond the extent necessary to bridge the gap realistically remaining between the parties.

3. Whether Public Law 88-108, providing for compulsory arbitration, invalidly attempted to delegate legislative power and deprive petitioner of rights without due process of law, in that, as construed and applied below, it did not provide guidance as to legislative policy and standards adequate to govern the decision of Arbitration Board No. 282 on the matters at issue, including the key issue as to what categories of assignments locomotive engineers should be required to work without engine service assistants ("firemen").

4. Whether Public Law 88-108, as construed and applied below, could, consistently with the provisions of Article I and the Fifth Amendment to the Constitution of the United States, authorize an *ad hoc* compulsory arbitration board to provide for the settlement of a dispute over terms and conditions of employment to apply to locomotive engineers and their engine service assistants ("firemen") by redelegating to some of the disputing parties, namely, first to the employing carriers and thereafter, to a lesser degree, to local

chairmen representing the assistants, full authority and responsibility for the interpretation and application of the language of the statute dealing with the safety, burden of work, and other important interests of the locomotive engineers, said redelegation being in general terms without clarifying instruction, without provision for supervision or subsequent review, the petitioner, as representative of locomotive engineers, being deprived of the right to participate in creating the new working conditions, of the right to be heard concerning them, and of the right, for a period of years, to bargain for a modification of the procedure or results.

5. Whether a compulsory arbitration board having concluded that a certain number of assignments require the continued employment of locomotive engineer's engine service assistants ("firemen") based on various considerations, i.e., to prevent excessive safety hazards to lives and property, to avoid imposing an undue burden on the remaining crew members, and to assure adequate and safe transportation service to the public, but having made no finding that the conditions underlying such considerations obtain with substantial uniformity in the more than one thousand seniority districts covered by the award and having before it substantial uncontradicted evidence of a high degree of variability in the conditions underlying such considerations among the seniority districts, its award, in permitting carriers the right to abolish the jobs of every such assistant subject only to a uniformly limited veto of not more than ten per cent in any seniority district, including those in which there are fewer than ten jobs or in which there are more than ten but fewer than twenty jobs, is so irrational, arbitrary, and op-

pressive as to contravene the requirements of due process.

6. Whether a compulsory arbitration statute, as construed and applied below, and a proceeding thereunder by an *ad hoc* board, composed mainly of partisans, afforded due process and the statutory protections of the Administrative Procedure Act to the petitioner in reducing employees' seniority rights, curtailing their job opportunities, and terminating their collective bargaining rights as to working conditions, without providing an opportunity to frame the issues and to present closing arguments and briefs on the entire record of the statutory hearing conducted by the board; without informing the petitioner of the findings or order proposed and affording petitioner an opportunity to be heard either in writing or orally as to the absence of a factual or legal basis therefor or as to policy reasons calling for the rejection of the findings or order proposed; without subsidiary findings on the record to support ultimate conclusions; without findings of any kind by a majority of the board; in reliance upon non-existent and inapplicable conclusions of other bodies; and with no opportunity for an independent judicial review.

7. Whether a single district court judge had jurisdiction to decide an action brought by petitioner for injunctive relief against the enforcement and operation of a compulsory arbitration statute, Public Law 88-108, as being repugnant to Article I and the Fifth Amendment to the Constitution of the United States.

8. Whether, with respect to the key issue in dispute, i.e., the number and types of locomotive engineers' assignments which should be run with and without

engine service assistants ("firemen"). Arbitration Board No. 282 was authorized to make a compulsory arbitration award which did not preserve, prefer, and complete the pattern of results reached through collective bargaining; which did not incorporate, relate to, or give any weight to terms and conditions that the parties had indicated in bargaining and mediation would be and might be acceptable to them; which did not reflect any narrowing of the areas of disagreement between the parties achieved during bargaining and mediation; and which made no use of and gave no effect to the report of the Secretary of Labor, duly furnished to the board pursuant to Sections 1 and 3 of the statute, setting forth the extent, item by item, to which the parties were in agreement.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Public Law 88-108, 45 U.S.C.A., Supp. 1963, § 157, 77 Stat. 132, is set forth in Appendix B, *infra*, at pp. 1a-5a. The relevant provisions of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, 44 Stat. 577, 48 Stat. 1185, are set forth in Appendix C, *infra*, pp. 5a-17a. Section 13 of the original Railway Labor Act (1926), 44 Stat. 577, 587, is set forth in Appendix D, *infra*, p. 17a. The provisions of 28 U.S.C. § 1254 (1), 62 Stat. 928, together with earlier statutes showing the relevant legislative history, are set forth in Appendix E, *infra*, pp. 18a-19a. The provision of 28 U.S.C. § 2282, 62 Stat. 968, is set forth in Appendix F, *infra*, p. 20a. The Administrative Procedure Act, 5 U.S.C. § 1001 *et seq.*, 60 Stat. 237, is set forth in Appendix G, *infra*, pp. 20a-24a. The relevant provisions of Article I and the Fifth Amendment to the Constitution of the United States are set forth in Appendix A, *infra*, p. 1a.

STATEMENT

Origins of the Dispute

This case arises from a difference in philosophy between management of the railroad carriers and the labor unions representing the operating employees of the railroads[4] concerning the role of collective bargaining in creating and modifying the working conditions of railroad employees. By notices served on the railway operating unions (including the petitioner) on November 2, 1959, management of most of the country's railroads demanded the abrogation of all agreements national or local, governing the basic working conditions of the employees (Car. Exh. 7, pp. 20-39, Tr. 75, 273; 279; Em. Exh. 6-A, p. 10, Tr. 1863, 1877). These notices sought for management the unrestricted right to determine unilaterally (and thereafter from time

[4] These employees include locomotive engineers (sometimes referred to as "enginemen") and their engine service assistants ("firemen"), conductors and trainmen, brakemen and switchmen. There are five labor unions representing such employees. Petitioner, the Brotherhood of Locomotive Engineers, commonly referred to as the BLE, represents engine service employees, notably locomotive engineers, on most properties involved in this dispute (Tr. 2427-2428); it also represents assistants to locomotive engineers ("firemen") on some properties in this dispute (Em. Exh. 6-B, p. 1; Tr. 1863, 1877). Conversely, the Brotherhood of Locomotive Firemen and Enginemen, commonly referred to as the BLF&E, represents most assistants to locomotive engineers; on some properties it also represents locomotive engineers. The duty of the "fireman" is to assist the engineer (Em. Exh. 7, p. 140, Tr. 2106, 2109; Em. Exh. 28, p. 2, Tr. 2447, 2494; Em. Reb. Exh. 14, pp. 8, 16; Car. Exh. 8, pp. 45, 219, Tr. 273, 279). All locomotive engineers formerly served as assistants and frequently locomotive engineers are bumped back into jobs as assistants as a result of fluctuation in business and of the high rate of productivity growth which results in more tonnage hauled at a faster speed by fewer engineers. (Tr. 2427-8; Em. Exh. 6-B, p. 1, Tr. 1863, 1877; Em. Exh. 6-A, p. 2, Tr. 1863, 1877; Em. Exh. 13, pp. 3-4, 6, 8, Tr. 2307, 2368).

to time to change as management might see fit), without collective bargaining and without reviewability, the territorial extent which a single crew might be required to run and the extra duties they might be required to perform en route (Car. Exh. 7, pp. 26-28, Tr. 273, 279). While seeking to add to the locomotive engineer's work content without restriction except by the 16-hour law, management also sought the unrestricted right to remove the locomotive engineer's assistant ("fireman") from all engine service assignments other than on passenger trains and to change the consist of train service crews (JA 39).[5] Further, the carriers proposed to cut mileage rates of pay by some 37 percent and to eliminate payments for non-mileage tasks performed by employees compensated solely on a mileage basis[5] (Em. Exh. 6-A, p. 12; Tr. 1863, 1877; Car. Exh. 8, p. 101, Tr. 273, 279).

The unions did not accede to these extraordinary demands. Instead, on September 7, 1960, they served notices of their own under the Railway Labor Act. (Car. Exh. 7, pp. 67-69, Tr. 77, 273, 279). These notices, together with implementing proposals, served by petitioner as well as by other unions (Car Exh. 2, pp. 24-46, Tr. 13, 18, 273, 279), demanded the maintenance of a full crew (including one locomotive engineer and one assistant to the locomotive engineer on each train),[6] premium pay for overtime

[5] It should be noted that operating rules are not at all in issue between the parties. Operating rules are rules which are provided by management for the governance of operations of trains and equipment.

[6] This does not mean one engineer and one assistant on each locomotive unit. Typically, an assembled locomotive consists of three or more units of locomotive power (sometimes 10 or 12 units) pulling 75 or more freight cars (frequently 200 or more cars).

hours, paid holidays, compensation for meals and lodgings when waiting without pay for a return assignment at the terminal, and other elements of modernization of working conditions.

Contract Negotiations and Mediation Prior To Passage of Public Law 88-108

By agreement, all issues in dispute were submitted for nonbinding recommendations and mediation by the Presidential Railroad Commission (PRC). After a prolonged adversary proceeding, conducted without a statutory basis, without the swearing of witnesses, without the framing of issues in accordance with any statement of policy or applicable standards, the PRC issued a majority report containing its nonbinding suggestions for the negotiation of an agreement.[7] (Car. Exh. 8, Tr. 81, 273, 279).

The public members of the Commission were gravely concerned with what they regarded as the "moribund" state of the industry (Car. Exh. 13, p. 5, Tr. 93, 96-97, 273, 279). The PRC failed in its purpose of finding a basis for settlement, its recommendations for the most part being unacceptable to the labor organizations (JA 41).

The carriers then issued a promulgation of changes in working conditions to be imposed unilaterally

(Tr. 255, 2438-9, JA 120, Em. Exh. 7, pp. 142, 147, 150, 153, Tr. 2106, 2109). On each train, there is only one engineer and one assistant ("fireman"), operating and maintaining the entire assembly of locomotive power. (Tr. 2438-39, 2554, Em. Exh. 7, p. 140, Tr. 2106, 2109).

[7] There were also minority reports (Car. Exh. 8, pp. 189-271, Tr. 273, 279), including one by A. E. Zimmerman, Asst. Grand Chief Engineer of the Brotherhood of Locomotive Engineers, bound separately from the principal report.

(Car. Exh. 13, pp. 55-117, Tr. 273, 279). Litigation ensued and the parties were relegated to self-help. *Brotherhood of Locomotive Engineers* v. *Baltimore and Ohio Railroad*, 372 U.S. 284 (1963).

On April 3, 1963, pursuant to Section 10 of the Railway Labor Act, the President appointed Emergency Board No. 154 (JA 42). That board, impressed with the vitality and earning capacity of the railroads and the high productivity of its workers (Car. Exh. 13, p. 145, Tr. 273, 279), recommended that the question of retaining or eliminating jobs of assistants to engineers ("firemen") be resolved by negotiating a procedure for examining each category of job, with third party assistance where necessary, on the basis of the relationship of the category to the safety and burden of work of remaining employees (Car. Exh. 13, pp. 146-149, 152, Tr. 273, 279, JA 60-61). The carriers accepted this as a basis for negotiating an agreement (JA 133). Thereafter, the labor unions made a number of proposals to implement the recommendations of the Emergency Board and to reduce them to contract terms (JA 134, 166 *et seq.*). However, agreement was not consummated. Submission of the dispute to voluntary arbitration was proposed several times and rejected each time by the labor unions (JA 43)[8].

On July 22, 1963, President Kennedy sent to Congress a message recommending the enactment of a proposed bill to submit the dispute to the Interstate

[8] The position of the labor unions was that with all due respect to the persons from time to time proposed as arbitrators, the unions as a matter of principle could not accede to the delegation of their responsibilities to third parties; that they could not entrust the welfare of their members to unknown procedures without restriction (JA 155, 156).

Commerce Commission for settlement. At the suggestion of the Senate Committee on Commerce, the Secretary of Labor undertook a resumption of mediation. On August 2, 1963, the Secretary of Labor made a notable written suggestion for the settlement of the dispute, leaving parametric details to be worked out in subsequent bargaining and mediation (JA 140-8). The Secretary's suggestions represented a reduction toward contract language of matters previously suggested or agreed upon by the parties,[9] notably the recommendations of Emergency Board No. 154 (JA 133, 135).

In subsequent mediation, it became evident to the Secretary of Labor that the parties had accepted his suggested pattern of agreement (JA 133, 135). As reported subsequently by the Secretary of Labor (JA 137-138) the parties indicated agreement as follows:

> "(a) The principle of blanking a fireman (helper) job if, but only if, there is no fireman (helper) on the fireman (helper) seniority list available to fill a vacancy which develops, if filling the vacancy would require a new hire and if blanking the job will not unduly endanger safety or

[9] Petitioner claims that "agreement" as used by the Secretary of Labor and in Public Law 88-108 refers to an expressed or implied indication of acceptability of a proposed resolution of a matter in dispute, ready to be put into effect after working our acceptable resolutions on other points remaining in dispute. No binding legal effect is presupposed. "Tentative agreement" is taken to mean an experimental acceptance. "Agreement" is connoted by expressions or actions indicating that a proposed solution "would" be acceptable. "Tentative agreement" is connoted by expressions or actions that a proposed solution "might" be acceptable. In the context of bargaining, there is no agreement in a final, legal sense unless and until there is an entire executed, legally binding instrument.

unduly burden other employees was accepted by both parties. . . .

"(b) The principle that certain categories of jobs can be agreed upon in advance as not requiring case-by-case review to determine safety and undue burden (so that review is to be limited only to determination of whether a job falls in these categories) was recognized by both parties. . . .

"(c) There was mutual acceptance of the concept of making jobs other than those falling in the categories referred to in the preceding paragraph blankable only after agreement or Special Board review of any disputed safety and undue burden issue. . . .

"(d) There was mutual acceptance of the Special Board review procedure to cover individual cases. . . .

"(e) There was mutual acceptance of the principle of blanking jobs only in the order of a sequence of categories, with provision to be made to cover situations in which jobs become vacant in an order different from the order of the sequence. . . .

"(f) There was substantial acceptance of the principles of the 'employee job rights' provisions as set forth. . . .

"(g) The bilateral Joint Board suggestion was accepted by both parties (but with disagreement about the effect to be given its determination and with little discussion of details of its functioning)." [10]

The Secretary of Labor was in continuous communication with the Chairmen of the Senate and House Committees considering the proposed legislation.[11]

---

[10] This concerned the development of policy following the expiration of the proposed agreement.

[11] S. Rep. No. 459, 88th Cong., 1st Sess., p. 7; 109 Daily Cong. Rec. 15277, 15283, August 28, 1963.

During the course of negotiation, agreement on the so-called "firemen" issue appeared to be so close that on August 6, 1963, following the submission by the engine service labor unions of a proposal which included specific numbers and terms entered in the blanks of the Secretary of Labor's August 2, 1963 proposal (Tr. 1790-4, 1800, JA 134, 200-7), the carriers and the Secretary of Labor insisted that there be convened the large group of union officials of the BLF&E who would be needed to ratify an impending agreement (Tr. 1800-1, JA 135). This was done (Tr. 1802). The BLE already had a committee in Washington with authority to conclude an agreement on all issues (Tr. 1799). The document which the carriers had in hand at the time they were insisting that the labor unions obtain authorization for the execution of an agreement "in view of the indications that the prospect of settlement was now very real" (JA 134-135) provided for all of the items of agreement listed above (Tr. 1791, 1795, 1797-8, 1800, JA 200 *et seq.*). The document provided for a limitation of 16 per cent on the number of "firemen" jobs to be eliminated (or a minimum of 84 per cent of the jobs to be retained) (JA 134-135, 204, Tr. 1872).

Within the time allotted, the parties failed to resolve their remaining differences and indeed, by August 12, the carriers had retreated to a degree from the high water mark of agreement which had been reached on August 6, 1963 (JA 134, 135, 136, 214). Thereafter the carriers again promulgated a unilateral imposition of the work rules changes they had originally demanded in their November 2, 1959 notices. The unions again gave notice of a peaceful withdrawal from service in the event of a unilateral imposition of work rules indicating, however, a willingness to continue essential

military and civilian transportation service with no personal compensation.[12]

On August 28, 1963 the Congress enacted Public Law 88-108 which differed from the bill recommended by the President in a number of respects, including the addition of the prescription in Section 3 that the Secretary of Labor furnish the Board memorandums on the bargaining and mediation results following his suggestions on August 2, 1963; that matters on which the parties "were" in agreement be incorporated in the award; and that due consideration be given in the award to matters on which the parties were in tentative agreement (*infra*, p. 3a).

Under Public Law 88-108 only the "firemen" issue[13] and the "crew consist" issue were referred to the Arbitration Board for settlement; the "other" issues, including all the demands of the labor unions, were referred to further bargaining (*infra*, pp. 3a-4a).

Proceedings Before Arbitration Board No. 282

Pursuant to the provisions of Public Law 88-108, the Arbitration Board consisted of three neutral members and of four partisan members.

The chairman of the board announced at the opening of the hearing the manner in which it would proceed

[12] Hearings before Senate Committee on S. J. Res. 102, 88th Cong., 1st Sess., p. 465.

[13] *I.e.*, the dispute over how many and which categories of assignment locomotive engineers would have to work without an engine service assistant. The additional problems concerning compensation, if any, for some displaced assistants and job rights for some individuals were not part of the November 2, 1959 or September 7, 1960 notices and were not the subject of a dispute that could have threatened the emergency to which Public Law 88-108 was addressed.

Tr. 6-7). No provision was made for framing the issues and over the objection of the petitioner the board followed the policy of admitting irrelevant and cumulative materials.[14] No provisions were made for surrebuttal or for closing arguments or for briefs. No provision was made for submitting proposed findings and order for review or comment by the parties.[15] Petitioner objected to the Board that it could not meet issues without knowing what the issues were (Em. Reb. Exh. 10, pp. 1-3).

The Award of Arbitration Board No. 282.

The award of Arbitration Board No. 282 was signed by the three neutral members and concurred in by the two carrier members; the two union members dissented. There was no opinion, or findings of fact, issued by the majority of the board. There was, however, an opinion signed and issued by the three neutral members of the board in which there was no concurrence. Their opinion contained no findings of fact on the record, the neutral members having stated (JA 54-55):

> "We shall not attempt to summarize in this opinion the considerable body of evidence introduced by the parties. It would be impossible to do do so within manageable limits without paraphrasing or omitting references to many matters which the parties deemed important; such an attempt as is evident from the organizations' reaction to the report of the Presidential Railroad Commission, would only lead to misunderstanding and resent-

[14] See, for example, Tr. 274-9, 1322-7, 1341-1352.

[15] Provision was made for the submisison of written statements of rebuttal subject to no further testing (Tr. 6, 4694-8). Petitioner objected by letter to the board dated November 9, 1963, which is included in the origianl record here.

ment. In our judgment the substance of the parties' presentations to us is essentially the same as that referred to in the Commission's report, and no useful purpose would be served by our covering the same ground again in this opinion.[16]

The neutral members' opinion was self-critical of the validity and usefulness of the award in terms of limitations of time, experience, and legislative context (JA 32-3, 61-2). In respect to the principal matter in dispute—the number and character of the jobs of assistants to locomotive engineers ("firemen") that were to be eliminated or retained—the neutral members in practical effect, repudiated the basis of Sections 1, 3 and 7 of the Act and of the Secretary of Labor's memorandum to the board pursuant to Section 3, stating (JA 50, 52, 61):

> "With regard to the treatment of firemen's *jobs* we have found next to nothing in the way of agreement that could serve as a meaningful foundation for our award.
>
> * * *
>
> "* * * we have found no substantial structure of agreement on which we could base our award concerning the proposed elimination of firemen's jobs. * * * In treating the *job* phase of the issue, then, we have had no alternative but to start from scratch, studying the evidence as to the duties and functions of firemen, drawing our own conclu-

[16] It is always easy to sympathize with a desire to avoid criticism. Perhaps, however, the neutral members of Arbitration Board No. 282 were unduly sensitive on this occasion; in the light of their well-established and well-deserved reputation for integrity, earnestness and ability, they would have less to fear from the reaction to a sound documented exposition of findings to support their conclusions than from an expression of distrust of the reactions likely to be encountered in making such a rational approach. In any event, sensitivity to criticism is not a substitute for due process.

sions as to the general need for firemen on locomotives that do not use steam power, and attempting ourselves to develop a practical system of determining which jobs, if any, may be eliminated.

* * *

"Our conclusion is that although the memorandum provided the focal point for their negotiations and in that sense may be said to have brought about a narrowing of the issues, the parties remained in hopeless disagreement on the crucial questions of the numbers and types of jobs on which firemen need no longer be employed, and the sequence and methods of their removal from service." (Emphasis as in original).

While not challenging the Secretary of Labor's report that the parties had accepted the principles of categories and sequences of jobs (as suggested originally in rudimentary form by Emergency Board No. 154 whose report both parties had received favorably and finally in form approaching contract language on August 2 and 6, 1963), the neutral members preferred to "start from scratch" and to devise a solution of their own invention (JA 50, 52, 54). Their solution, concurred in by the carrier members of the board, was to give each carrier the right to list for extinction, in each seniority district, all engine crew assignments which in the carrier's judgment, based on the carriers' own "considerations of safety, undue work burden,[17] and adequate and safe transportation service to the public" do not require the services of a "fireman", with the local chairman representing the locomotive engineers' engine service assistants ("firemen") having the right thereafter to save some jobs based on his own "considera-

[17] This obviously refers to safety and undue work burden of employees remaining after the assistant's jobs are discontinued.

tion of safety, undue work burden and adequate and safe transportation service to the public" (JA 12, 13). The limitation of the number of jobs that could be saved was fixed uniformly at not more than ten per cent for each seniority district (JA 13). No provision was made for supervising or checking the determinations of the carriers and the local chairmen representing the locomotive engineers' assistants. Without explanation, the award eliminated the representatives of the locomotive engineers from further participation in the creation or modification of agreements concerning the composition of engine service crews. The award did not provide for any degree of participation by the locomotive engineer's representatives in deciding which ten per cent of the jobs should be retained to protect him, as the remaining employee, against hazards and undue burden of work.

Without explanation, the award sharply curtailed existing seniority rights of retained employees, even those with more than ten years' seniority (JA 19).

Without explanation, the board introduced into the award other terms and conditions very much harsher in effect on the employees than had been demanded by the carriers, e.g., the use of a single job offer to eliminate a succession of men from the employment rolls of successive seniority districts (JA 16-8, 271Y-Z).

With respect to the key question of how many and which assignments locomotive engineers should operate without engine service assistants it is uncontradicted that the award in no way reflects any matters on which the parties were in agreement, or in tentative agreement, or on which they had narrowed the areas of disagreement or any matters relating to extent of agreement set forth in the Secretary of Labor's memoran-

dum furnished to the board pursuant to Section 3 of the Statute. It is uncontradicted that the solution specified in the award is completely an invention of the board.

Proceedings in the Courts Below

Under the provisions of Section 9, Third, of the Railway Labor Act (45 U.S.C. § 159), the Declaratory Judgments Act (28 U.S.C. § 2201 *et seq.*), an Act conferring jurisdiction in cases arising under statutes regulating commerce (28 U.S.C. § 1337), the Administrative Procedure Act (5 U.S.C. § 1001 *et seq.*, 60 Stat. 237), and the Constitution of the United States, a petition and complaint were filed (Civil Action No. 2921-63) in the United States District Court for the District of Columbia on December 3, 1963 seeking impeachment and vacation of the award,[18] a declaratory judgment and injunction against the carrier parties to the dispute and the board (JA 27-P, *et seq.*). On December 18, 1963 the court granted the unopposed motion of the United States to intervene as a defendant (JA 3).

Petitioner's attack on the award and on the statute under which the award was issued was based on the following grounds: That the redelegation by the board of statutory responsibility and authority was illegal (JA 27-R, 27-U); that the award of the board did not conform and confine itself to the statutory prescription and limitation in that, among other things, it nullified and discarded the basic statutory scheme to preserve, prefer and utilize the results of collective bargaining and mediation

[18] The award had been filed in that Court under Docket Misc. No. 41-63.

(JA 271V-Z, 271Z3-271Z4, 271Z7-271Z8); that the proceedings before the board were lacking in due process in numerous respects including the failure to afford petitioner an opportunity to meet the issues by the absence of proposed findings and order (JA 271Z3), failing to make findings of fact (JA 271Z, 271Z4), and relying upon nonexistent or inapplicable conclusions of other nonbinding boards (JA 271V, 271Z5-271Z7); that to the extent that Public Law 88-108 is construed as intending or permitting Arbitration Board No. 282 to do what it had done in its proceedings and in its award, the statute is invalid as constituting an improper and unrestrained delegation of legislative power and depriving petitioner of due process of law (JA 271Z, 271Z10); and that the award unconstitutionally denied employees the right to bargain collectively (JA 271U, 271Z10).

Cross motions for summary judgment were filed on January 2, 1964 and a hearing on the motions was held in the district court on the same day (JA 4).

The decision of the district court was announced in an opinion by Judge Holtzoff on January 8, 1964 (JA 368) and an order was entered on January 10, 1964 (JA 394) denying the motion of plaintiff and granting those of the defendants.

The district court rejected as a contention "entirely lacking in merit" the complaint concerning redelegation to the carriers and local chairmen of the organization representing locomotive engineers' assistants ("firemen"), comparing the redelegation to a reference by a court to a special master (JA 384). As to the exclusion of representatives of the locomotive engineers from any participation, the decision was silent.

The district court held that Section 3 did not require the board to incorporate in its award matters on which the parties were in agreement (JA 381) and further that "agreement" in Section 3 refers only to binding commitments (JA 382).

The decision characterized the neutral members' opinion as the board's opinion (*ibid.*) and their conclusions as findings of fact by the board (JA 383).

The court held the Administrative Procedure Act inapplicable and did not refer to other questions raised concerning administrative due process (JA 379).

The permitted scope of judicial review was held to be "exceedingly limited and narrow", "much narrower than that which generally prevails in connection with administrative decisions" (JA 378-379).

The district court also found that compulsory arbitration is not a far-reaching innovation (JA 389), that the standards of the statute were sufficiently adequate (JA 391), that the constitutional issues raised were insubstantial (*ibid.*), that injunctive relief would be surplusage (JA 386), and that a three-judge court was not required to be convened (JA 391).

In the Court of Appeals petitioner sought a reversal of the order of the district court on substantially the same grounds that were used at the district court level in attacking the award and the statute under which the award was made (R. 415; 437-440, 459, 476-478, 669-670).

In a per curiam opinion (pp. 25a-27a, *infra*), with Judge Wright dissenting from the holding that no substantial constitutional issue had been raised and

that a three-judge court was not required (pp. 27a-28a, *infra*), the Court of Appeals affirmed and adopted the district court's decision (p. 27a, *infra*).

REASONS FOR GRANTING THE WRIT

I. The unprecedented questions of constitutional law and federal statutory law in this case require resolution by this Court for the protection of the rights of the more than 200,000 workers who run the Nation's trains, and for the protection of the basic freedom of our system of labor relations.

A. The concept of federal compulsory arbitration, as developed and approved below, brings into question the applicability of fundamental constitutional doctrines in an important and hitherto untested area.

The belief is widely held that this Nation faces a growing social crisis arising from the myths and evolving realities of man's use of his technology. National policy is essential as a prerequisite to the use of federal compulsion in this area. Our system of law does not sanction the development of such policy on an *ad hoc* but compulsory basis by partisan bodies having no responsibility to the electorate. Policy, in this critical area, as in any other area affecting the commerce and general welfare of the country, is for Congress to formulate. Only the function of implementation of national policy may be delegated, and then only by due process within the framework of standards.

What is involved in this case is a statute and a proceeding which—under the stress of a potential emergency in essential transportation services—attempts a short-cut solution to the formulation and application

of policy, a solution that at every key point abridges, to an extent shockingly in excess of anything required to deal with the threatened emergency, the basic legal and human rights that workingmen, along with others, enjoy in a free society. The holdings of the court below are based on the theory that a process bearing the style and title of "arbitration" is as free under public law to create policy binding on parties disputing over their future interests as a voluntary arbitration might be in creating policy for the content of contractual relationships. Under this theory, the court below has justified the compulsory determination, in broad scope, of what the *interests* of American workingmen *should* be. On the same theory, the court below has justified the making of such a determination on the basis of the economic and philosophical predilections of an *ad hoc* group of selected disputants and neutrals rushing through a hearing lacking essential elements of due process in order to meet a close statutory deadline (JA 374, 377). It is unchallenged that on key questions in dispute this compulsory determination owes nothing whatsoever to any statutory statement of policy and of standards.

If this case were to stand in its present posture, it would constitute an example and invitation to substitute public relations and political relations for labor relations. Once compulsory arbitration, without policy and standards laid out by Congress adequate to govern the result, is offered as a prize to a party achieving a deadlock, then working conditions will depend less on the merits disclosed in collective bargaining than on the resources devoted to the cultivation of a public image.[19]

[19] The availability of compulsory arbitration "in some sort of application of Parkinson's Law to industrial relations, both guarantees the use of the process and the extension of its use to

Only the constructive intervention of this Court can prevent this case from casting an ugly and menacing blot on a system of law under which the American worker may live his working life in dignity and freedom. Only the constructive intervention of this Court can turn the trend away from the shallow and illegal solutions that promise to make labor relations as dependable as Mussolini's trains. There is no greater need today in the field of labor relations than a new incentive to bargain. The decision of this Court in this case can restore bargaining incentive in the railroad industry and can assure its continued existence in American industry generally.

And, if bargaining were still to fail in this industry, Congress could deal with any resulting emergency in a number of ways which do not countenance the illegal delegation and redelegation of legislative authority and the abridgement of due process.

B. Earlier instances of approved regulation, relied upon below (JA 388-391), are sharply distinguishable from that involved in this case. In *Wilson* v. *New*, 243 U.S., 332 (1917), for example, Congress enacted a simple limitation on the hours of a normal day's work. This was done by Congress directly, and in an industrial context from which Congress could draw its logical and reasonable conclusion regarding appropriate policy. In the instant case, of course, no one

---

new areas * * * grievance arbitration experience may not be used as a guide to likely experience under compulsory arbitration of new contracts. For in grievance arbitration, guides exist for negotiation and a concession on one point does not endanger gains elsewhere." Benewitz, Maurice C., Grievance Arbitration Experience as a Guide to Compulsory Arbitration Expectations, 14 Lab. L. J. 790, 791 (September 1963). See also: R. W. Fleming, 'The Search for a Formula', in I. Bernstein, H. L. Enarson, R. W. Fleming (eds), Emergency Disputes and National Policy, New York, Harpers & Bros., 1955, pp. 211-213.

has yet provided any simple figure or simple context; what is involved is the prospective relationship between contending parties, the creation of a quasi-agreement which will govern that relationship in quite complicated detail over a term of years. Perhaps even more decisive is the difference in the source of the policy to be applied. In *Wilson* v. *New*, that source obviously was the Congress; in this case, that source, as Public Law 88-108 has been construed and applied, is the *ad hoc* arbitration board, whose award on the key issue of which runs and assignments locomotive engineers would be required to operate without engine service assistants derived no aid from such prescriptions of policy and standards as were laid out in a statute.

The courts below adopted the view, which was urged by respondents below, that compulsory arbitration was not a far-reaching innovation, since "compulsory arbitration" for "minor disputes" under the Railway Act went as far back as 1926 (JA 389). But there is a vast difference between a determination of what the parties mean in an agreement of their own making and a determination of what kind of agreement the parties should make.[20] What large area of discretion is involved in the functions of ascertaining the intended interpretation or application of existing agreements, or

---

[20] "The arbitrator in grievance proceedings performs a judicial function—he interprets and enforces an existing contract. * * * In interest arbitration, on the other hand, the arbitrator performs a legislative act—he creates the contract. A dispute over contract terms is non justiciable." The Peaceful Settlement of Disputes Over Contract Terms in Symposium: Arbitration and the Courts, 58 N.W. U.L. Rev. 466, 559 (Sept-Oct, 1963). For cases so holding see *Boston Printing Pressmen's Union* v. *Potter Press*, 1st Cir., 1957, 241 F. 2d 787, certiorari denied, 355 U.S. 817; *Austin Mailers Union* v. *Newspapers, Inc.*, 5th Cir., 1963, 55 L.R.R.M. 2693, 2694; *Matter of Buffalo and Erie Ry. Co.*, 250 N.Y. 275, 278-279, 165 N.E. 291, 292 (1929).

the determination as to what the existing practices on a railroad are? It is nothing less than shocking to equate this with the revolutionary development of compulsory arbitration to decree what interests shall be served, what rights are to be created or abridged or denied.

II. Public Law 88-108, as the first federal statute providing for compulsory arbitration of the prospective interests of disputing parties, was construed and applied in the award of Arbitration Board No. 282 and by the courts below, in a manner which resulted in a massive obliteration of bargaining rights and property rights in contravention of due process.

A. The power of Congress to deal with a national emergency is not at issue here. The existence of an emergency was declared by the Congress, and petitioner is aware that it would be unavailing to argue that the congressional conclusion was by no means inevitable. Petitioner has not raised, here or below, any question as to the power of the Congress, if properly exercised, to prevent a national stoppage of commerce by rail. And within very broad limits petitioner is not disposed to question Congress' right, in responding to the exigencies of the situation, to choose a new, untried, and drastic remedy.

However, in choosing compulsory arbitration as a remedy, Congress could not escape the requirements of due process under law, and it could not simply turn over to other and private hands the formulation of a policy and of standards within which a settlement of the dispute was to be had. The designation of a process as "arbitration" has no talismanic effect on the applicability of Article I and the Fifth Amendment to the Constitution, and statutory protections.

No claim of emergency can alter the fact stated by this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 589 (1952): "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."

B. The award constituted an unconstitutional exercise of legislative power. Public Law 88-108 provided for revolutionary social innovation where standards could not be derived from historical, known, or practical context. As construed by the courts below, the statute failed to supply sufficiently explicit standards to prevent the exercise of a range of discretion which is the equivalent of legislating. Such a delegation without standards stands condemned as unconstitutional by this Court's decisions in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420-430 (1935); *Schechter Poultry Corp* v. *United States*, 295 U.S. 495, 529-542 (1935). Compare *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *Arizona* v. *California*, 373 U.S. 546, 626-627 (1963), opinion of Mr. Justice Harlan, dissenting in part. The *Panama* and *Schechter* cases have been followed by state courts to hold unconstitutional state laws providing for compulsory arbitration of labor disputes without legislative prescription of adequate standards. *Van Riper* v. *Traffic Tel. Workers' Fed. of New Jersey*, 2 N.J. 335, 66 A. 2d 616, 9 A.L.R. 2d 854 (1949); *Transport Workers Union* v. *Circuit Judge*, 322 Mich. 332, 348, 34 N.W. 2d 71 (1948); *State ex rel. Everett Fire Fighters* v. *Johnson*, 46 Wash. 2d 114, 278 P. 2d 662 (1955). In each of the cases upon which the courts below relied (JA 390-391), Congress has used words which in their historical, known, or practical context, provided policy and standards to govern the exercise of the delegated authority. . .

C. The degree of interference with the parties permitted by the statute, as construed and applied, was grossly disproportionate to the occasion. An *ad hoc* group, exercising governmental power, was permitted to intrude in a plenary manner into the area of determination and prescription of the interests of private parties engaged in a labor dispute. The degree of intrusion on key issues in dispute—in departing completely from the pattern of interests which had been emerging from the history of bargaining and mediation—was, in every practical and legal effect, without restraint. There was no assessment of the severity of the injuries caused private parties, notably the petitioner, against that which would be sufficient to protect the public interest.

Labor unions and their members depend on the potential exercise of economic self-help both to improve their existing conditions and to ward off attempts to degrade existing conditions. On its face, it is unconscionable and confiscatory to ask labor unions, in the national interest, to lay down their basic weapon and then to impose upon those unions and their members terms and conditions of employment very much inferior to those previously available to them in the course of realistic bargaining and mediation.

When the carriers themselves thought that they were close to an agreement with the petitioner, the parties were talking about a designation of some 16 per cent of the total number of assignments on which engineers would be required to run without an engine service assistant (JA 134 and 204). When the compulsory arbitration board came up with its award "from scratch" that 16 per cent had risen to 90 per cent or more!

Likewise the negotiations at the time when the carriers themselves believed the prospect of settlement to be very close had not involved any mention of the exceedingly mischievous and damaging provision contained in the award whereby one undesirable job offer could wipe out seniority list after seniority list (JA 17-18). Nor did the negotiations at the time that the carriers themselves believed a settlement to be very close, contemplate the castration of existing seniority rights, built up through the years, as was dictated by the award (JA 19-20). In these and other respects, the award failed to maintain or restore the employees to anywhere near the position they had before they were compelled to forego economic self-help out of consideration for the public interest. Thus the result of the operation of the statute, as construed and applied by the board and the courts below, is so remarkably disproportionate to the requirements of the occasion —emergency or not—as to constitute a grave infringement of rights and property without the protection of due process.

D. The compulsory arbitration board invalidly and unfairly redelegated statutory responsibility and ousted petitioner from its statutory obligation and authority to represent employees in collective bargaining over the creation and modification of their working conditions. It also deprived locomotive engineers of the right to be represented in collective bargaining over their own working conditions by representatives of their own choosing, contrary to the intent of Section 2, First, Second, and Fourth of the Railway Labor Act, which were not repealed by Public Law 88-108.

It must be presumed that in enacting Section 2 of Public Law 88-108, providing for the naming of three

neutral members of the arbitration board by the parties themselves, or, failing that, by the President of the United States.[21] Congress contemplated that the functions entrusted by it to the board would be carried out by responsible identifiable individuals of unquestioned character and of unquestioned neutrality. It is incredible to presume that Congress or the President of the United States would turn over the important matters comprehended in the statutory resolution of the nationwide work rules dispute to some thousands of unknown individuals, with contending interest in the matter; utilizing standards of their own making and applying these standards to the question of safety and adequacy of service to the public and to the interest of employees whose representatives are barred by the award from participating in the redelegation of authority. This is indeed delegation and redelegation with vengeance and it is precisely what the award of the compulsory arbitration board provides (JA 12-14). This was done without instructions, without clarifying definition and interpretation, without providing for supervision or check, and without explanations of any kind for the exclusion from the whole process of the locomotive engineer, the very employees whose safety and burden of work are most at stake when he remains on the engine that, for the first time, he must operate without an engine service assistant.[22] The result, under the award, is that the subdelegees

---

[21] In this instance it was the President who made this selection (Bd. Exhs. 2A, 2B; 2C, Tr. 4).

[22] (Em. Exh. 24, p. 1, Tr. 2435, 2442; Em. Exh. 27, p. 2, Tr. 2447, 2494; Em. Exh. 29, pp. 3-17, Tr. 2503, 2547; Em. Exh. 30, pp. 3-16, Tr. 2503, 2548; Em. Exh. 34, p. 5, Tr. 2503, 2582; Em. Reb. Exh. 12, p. 4; Em. Reb. Exh. 14, pp. 38-40; Car. Exh. 8, pp. 214-220, 223-4, Tr. 18, 273, 279).

may exercise authority under the award without submission to the mandates of equality and liberty which must bind every group exercising a public function. *Nixon* v. *Condon*, 286 U.S. 73 (1932). See also *Edwards* v. *Capital Air Lines*, 176 F. 2d 755 (App. D.C., 1949), certiorari denied, 338 U.S. 885, dealing with award made by a board whose interests were in conflict with those to whom the award would apply.

E. Nowhere in the award or in the opinion of the neutral members is there any indication, by way of finding or conclusions, that seniority districts, numbering more than one thousand over the country, are substantially uniform in operating characteristics and in manpower utilization. The opinion of the neutral members itself discloses that they are of a contrary view. They assert that sufficient knowledge upon which to base standards of safety and adequacy of service and burden of work can be obtained only by first-hand observation on the property of each of the carriers involved in the case (JA 62-63). The neutral members determined that there is need for the continued employment of some locomotive engineer's engine service assistants ("firemen") in order to prevent excessive safety hazards to lives and property, to avoid imposing an undue burden for the remaining crew members and to insure safe and adequate transportation service to the public (JA 28). These considerations are substantially affected from place to place by highly variable conditions, *i.e.*, the character of terrain, visibility, speed, hours on duty and mix of work; the number of units of power and number and disposition of various types of cars in the consist; traffic density on and across the rails; character of protective devices and communicating systems; type, age

and condition of equipment and roadway, nature of inspection procedures; number and experience of train crew members; management policy and practice, as in encouraging observation or violation of speed restrictions and other rules; and a host of other factors.[23] The petitioner had no hint that the board was considering a uniform across-the-board abolition of firemen. The petitioner therefore never had the opportunity to demonstrate to the board that such a solution is irrational. The failure of the board to provide the parties with the opportunity to see and comment upon proposed findings and a proposed order is of tragic consequence in this connection. Lives and limbs, the public's, as well as the employees', are jeopardized by this procrustean approach.

This unfortunate but basic component of the Board's award is so irrational, arbitrary, and oppressive as to contravene due process.

F. The partisan, nonrepresentative composition of the board, the insufficiencies and irregularities of the proceedings leading to the award, and the restriction as to the scope of judicial review of the award, all upheld in the court below, resulted in deprivation of due process of law. Arbitration Board No. 282 was an agency exercising quasi-legislative and quasi-judicial functions. It consisted of seven persons, a majority of whom had interests in the outcome of their proceedings. Quasi-judicial or quasi-legislative action by such a body is lacking in due process. *Carter*

---

[23] (Em. Exh. 7, pp. 141-143, 148-150, 154-156, Tr. 2106, 2109; Em. Exh. 28, pp. 3-10, Tr. 2447; 2494; Em. Exh. 38, pp. 1-3, Tr. 2538, 2609; Em. Exh. 42, pp. 1-2, Tr. 2539, 2604; Em. Reb. Exh. 13, p. 3; Em. Reb. Exh. 22, pp. 1-2; Em. Reb. Exh. 24, p. 2; Em. Reb. Exh. 26, p. 2.

v. *Carter Coal Co.*, 298 U.S. 238, 310-311, 318 (1936); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935); *Milk Marketing Board* v. *Johnson*, 295 Mich. 644, 656-660, 295 N.W. 346, 351-352 (1940); *Group Health Ins.* v. *Howell*, 40 N.J. 436, 444-445, 193 A. 2d 103, 108 (1963); *Becker* v. *State*, 7 W.W. Harr., Del. 454, 185 Atl. 92, 100 (1936); *State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners*, 40 Calif. 2d 486, 254 P. 2d 29, 36 (1953); *Sunbeam Corp.* v. *Richardson*, DC WD Ky., 144 F. Supp. 583, 591 (1956).

No findings of any kind were made by a majority of the compulsory arbitration board. Three members of the Board concurred in one opinion, two members of the board concurred in the other and two members of the board had individual statements of opinion. Inasmuch as due process requires findings of fact by the body making an administrative decision the award is fatally defective. *Panama Refining* v. *Ryan*, 293 U.S. 388, 432 (1935). Further, no findings were made even by the neutrals to cover the issues essential to the order. This is also fatally defective as lacking due process. *Florida* v. *United States*, 282 U.S. 194, 215 (1931); *ICC* v. *Mechling*, 330 U.S. 567, 582-583 (1947); *Colorado-Wyoming Co.* v. *FPC*, 324 U.S. 626, 634 (1945); *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488, 489 (1942); *Best Foods, Inc.* v. *United States*, Customs Ct., 3d Div., 218 F. Supp. 576, 582-583 (1963). Findings will not be implied from the result. *United States* v. *B&O Railroad Co.*, 293 U.S. 454, 462-465 (1935). Nor will the court sustain an award which could have been supported by proper findings but was not. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88, 93-94 (1943).

The board did not provide as a matter of policy for the exclusion of irrelevant and immaterial and unduly

repetitious evidence as is required both by due process of law and by Section 7 (c) of the Administrative Procedures Act (5 U.S.C. § 1001 *et seq.*).

The neutral members made use of the PRC report in an improper manner (BA 59). The PRC was a nonstatutory body, which did not conform to such legal standards in its hearing as swearing witnesses or framing issues. Reliance by the neutral members on that commission's fact findings therefore, in the context of the type of consideration of the facts afforded by the Arbitration Board, denied due process. See *Harmon* v. *Brucker*, 355 U.S. 579 (1958); 20 Am. Jur. Sec. 686, pp. 578, 579; Sec. 695, p. 586, and cases cited.

The neutral members also cited in their opinion as one fact leading them to their "findings and conclusions", their belief that Emergency Board No. 154 had concluded that in most instances firemen are not required in road freight and yard service and that in addition several emergency boards and one arbitration board in this country ruled generally the same way (BA 56-57). There is nothing in the report of Emergency Board No. 154 which expressly or by fair implication resembled the conclusion attributed to it by the neutral members of Arbitration Board No. 282. Likewise no proposal which contemplated the removal of engine service assistants from road freight and yard service was ever passed on by any emergency board or arbitration board other than Emergency Board 154 and the so-called Arbitration Board No. 282. That the neutral members relied in part on a nonexistent conclusion of the Emergency Board No. 154 constitutes a deprivation of due process.

The holding of the courts below (JA 378-379) that petitioner was not entitled to an independent judicial

review also denied petitioner due process. *St. Joseph Stockyards* v. *United States*, 298 U.S. 38, 51-52 (1936).

III. This case presents important issues of statutory construction which should be decided by this Court. The construction and application of Public Law 88-108 by Arbitration Board No. 282, as upheld by the court below, rendered nugatory the manifest intent of the statute to preserve, prefer and utilize the result of collective bargaining efforts; to complete a pattern of bargaining which the parties had almost completed themselves (JA 134-135). In directing that matters on which the parties were found to be in agreement be incorporated in the board's award, Congress had reference to a real situation, the bargaining and mediation status of the key issues in the dispute under the parties' notices, notably the question of which assignments locomotive engineers might henceforth be required to work without an assistant ("fireman") (S. Rep. 459, 88th Cong., 1st Sess., p. 10; H. Rep. 713, 88th Cong., 1st Sess., pp. 9, 14.) That bargaining and mediation status, as viewed by the committees in charge of the legislation was not a hopeless one; the parties appeared to the committee to be fairly close to settlement of the key issues (*ibid.*) Under these circumstances, Congress could not have regarded as useless the structure of agreement which the parties had been approaching (JA 133, 134-135, 200 *et seq.*).

Congress directed the Secretary of Labor, who was mediating with the parties and, at the same time, consulting with the Congressional committees drafting the legislation (S. Rep. 459, 88th Cong., 1st Sess., p. 7; H. Rep. 713, p. 3), to provide the details of the bargaining and mediation status so that the compulsory arbitration board could adopt what the parties had

already come to and then fill in the gap to complete the structure (H. Rep. 713, 88th Cong., 1st Sess., p. 14; 109 Daily Cong. Rec. 15277, 15292-15293, August 28, 1963).

This intention was frustrated in the award's completely new solution for the key issue of engine service manning. In respect to this issue, the award could have come to the same result in the absence of any legislative prescription or admonition to make any use whatever of the previous bargaining of the parties or the mediation results achieved by the Secretary of Labor.

In thus nullifying the provisions of the statute, the board and the courts below construed out of existence the requirement in Section 3 of the statute that matters on which the parties were in agreement be incorporated in the award. The courts below upheld a construction that left the board free not to incorporate matters on which there was agreement (JA 382).

Further the term "agreement" was itself given a self-defeating construction by the neutral members of the board. According to their interpretation the term "agreement" used in Section 3 of the Act connoted a meeting of the minds having the consequence of a binding commitment (JA 49); this was also the construction which appealed to the courts below (JA 353). However, the word "agreement" is often used to mean no more than concord, the union of two or more minds or a concurrence of views and intention without legal consequences. *Sage* v. *Wilcox*, 6 Conn., 81, 85 (1826) cited in 1 Corbin on Contracts (1963), p. 20, n. 14. It is only this popular, nontechnical use of the term which could have been intended by the Con-

gress; on August 28, 1963 the date of enactment, the bill was passed precisely because no agreement had been or, prior to a complete settlement, could have been reached in a technical, legal sense (JA 353-356).

This Court held in *NLRB* v. *Radio & Television Engineers Union*, 364 U.S. 573 (1961), that an administrative agency is without power to avoid following the plan of the statute which it administers even though it may decide that the plan is unsound or unwise. It would be incongruous to permit an exemption from this salutary rule of law in the case of an *ad hoc* compulsory arbitration board.

The cardinal principle of statutory construction which should have been applied in this case, and was not, is to save and not to destroy. A reasonable construction would have given effect to all provisions of the statute; the construction adopted by the board and by the court below renders every provision of the statute dealing with collective bargaining and mediation merely redundancies. A ruling by this Court is needed on the question of whether the courts below were correct in permitting the *ad hoc* compulsory arbitration board that latitude of construction of its statutory obligations and limitations.

IV. The exercise of this Court's supervisory power is needed in this case to require compliance in the courts below with 28 U.S.C. § 2282. The single-judge district court was without jurisdiction to decide an action for interlocutory relief against the enforcement and operation of an unprecedented compulsory arbitration statute (Public Law 88-108) where such action was based on the repugnance of the statute to the Constitution of the United States. The departure

from the required convening of a three-judge district court was sanctioned by the court below. On this point, reference is made to the arguments presented in the Petition for a Writ of Certiorari in No. 935, pp. 15 *et seq.*, which arguments are adopted for this case.[24]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAX MALIN
1250 Federal Bar Building
Washington, D. C. 20006

RUTH WEYAND
1346 Connecticut Ave. N.W.
Washington, D. C. 20036

Attorneys for Petitioner

April 15, 1964

[24] The district court was mistaken in attributing to petitioner the expression of a view that 28 U.S.C. § 2282 is inapplicable to this case (JA 329, 386, R. 668).

APPENDIX A

Article I of the Constitution of the United States provides, in pertinent part:

> Section 1: All legislative Powers herein granted shall be vested in a Congress of the United States; * * *

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

APPENDIX B

Public Law 88-108, 45 U.S.C.A. Supp. 1963, § 157, 77 Stat. 132, provides:

> Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and
>
> Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and
>
> Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and
>
> Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and
>
> Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement; Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

SEC. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If

either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helphers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of

the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however*, That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution, and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 3 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration

to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

APPENDIX C

The Railway Labor Act, 45 U.S.C. § 151, *et seq.*, 44 Stat. 577, 48 Stat. 1185, provides, in pertinent part:

GENERAL DUTIES

SEC. 2. First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. * * *

* * * * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * * * * *

NATIONAL RAILROAD ADJUSTMENT BOARD

SEC. 3. First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act,

* * * * *

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (i) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * * * *

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dis-

pute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees. "

* * * * *

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives,

selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

* * * * *

PROCEDURE IN CHANGING RATES OF PAY, RULES AND WORKING CONDITIONS

SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

ARBITRATION

SEC. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy

may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board, and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however*, That

the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands

or at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however*, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to

issue such subpoenas. In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Act to regulate commerce approved February 4, 1887, and the amendments thereto.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

SEC. 8. The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning or the application of the provisions of an award made by a board of arbitration shall be referred back for a ruling to the same board, or by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however*, That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

SEC. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result

of the arbitration: *Provided, however*, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further*, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however*, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole, or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of

the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Nothing in this Act shall be construed to require an individual employee to render labor or services without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

APPENDIX D

Section 13 of the Railway Labor Act as originally enacted (Act of May 20, 1926, 44 Stat. 577, 587) was as follows:

SEC. 13. (a) Paragraph "Second" of subdivision (b) of section 128 of the Judicial Code, as amended, is amended to read as follows:

"Second. To review decisions of the district courts under section 9 of the Railway Labor Act."

(b) Section 2 of the Act entitled "An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit court of appeals and of the Supreme Court, and for other purposes", approved February 13, 1925, is amended to read as follows:

"SEC. 2. That cases in a circuit court of appeals under section 9 of the Railway Labor Act; under section 5 of 'An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes', approved September 26, 1914; and under section 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, are included among the cases to which sections 239 and 240 of the Judicial Code shall apply."

APPENDIX E

The relevant provisions of the Judiciary Act of 1925 (Act of February 13, 1925, 43 Stat. 936, 938, 939) are as follows:

"That sections 128, * * * and 240 of the Judicial Code as now existing be, and they are severally, amended and reenacted to read as follows:

"SEC. 128. * * *

* * * * *

"(b) The circuit court of appeals shall also have appellate jurisdiction—

* * * * *

"Second. To review decisions of the district courts sustaining or overruling exceptions to awards in arbitrations, as provided in section 8 of 'An Act providing for mediation, conciliation, and arbitration in controversies between certain employers and their employees', approved July 15, 1913."

* * * * *

SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

* * * * *

SEC. 2. That cases in a circuit court of appeals under section 8 of 'An Act providing mediation, conciliation, and arbitration in controversies between certain employers and their employees,' approved July 15, 1913, . . . are included among the cases to which sections 239 and 240 of the Judicial Code shall apply.

The relevant provisions of 28 U.S.C. 347, 1940 ed., are identical with those of section 240, 43 Stat. 938, 939, above.

except that in Section 347(a) the words "United States Court of Appeals for the District of Columbia" were substituted for the words "Court of Appeals of the District of Columbia" and except that Section 347(a) omitted the words "writ of error or."

The relevant provisions of 28 U.S.C. § 348, 1940 ed., are as follows:

Sec. 348 * * *

Cases in a circuit court of appeals under Section 459 of Title 45 * * * are included among the cases to which sections 346 and 347 of this title shall apply.

The relevant provisions of the Judiciary and Judicial Procedure Act (Act of June 25, 1948, 62 Stat. 869, 928, 984, 992, 1001), which are presently in effect (28 U.S.C. §§ 1254, 2680) are as follows:

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

* * * * *

§ 2680. Exceptions.

* * * * *

Sec. 39. The section or parts thereof of Statutes at large enumerated in the following schedule are hereby repealed. * * *

Schedule of Laws Repealed.

	Statutes at Large				U.S. Code	
Date	Chapter	Section	Volume	Page	Title	Section
******	***	**	**	****	**	*******
1926						
May 20	347	13	44	587	28	225,348
******	***	**	**	***	**	*******

APPENDIX F

28 U.S.C. § 2282, 62 Stat. 968, provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

APPENDIX G

The pertinent portions of the Administrative Procedure Act, 5 U.S.C. § 1001, *et seq.*, 60 Stat. 237, are as follows:

DEFINITIONS

SEC. 2. As used in this Act—

AGENCY

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; . . .

* * * * *

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * * * *

ADJUDICATIONS

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11 of this Act; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * * *

HEARINGS

Sec. 7. In hearings which section 4 or 5 of this Act requires to be conducted pursuant to this section—

* * * * * * *

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

* * * * *

SANCTIONS AND POWERS

Sec. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

* * * * * *

JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion,—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter

in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully

withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conditions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 of this Act or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * * * *

CONSTRUCTION AND EFFECT

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. * * * No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,331

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al., Appellants*

v.

CERTAIN CARRIERS, etc., *et al., Appellees*

No. 18,332

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al., Appellants*

v.

CHICAGO, BURLINGTON AND QUINCY RAILROAD, *et al., Appellees*

No. 18,333

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellant*

v.

CERTAIN CARRIERS, etc., *et al., Appellees*

No. 18,334

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellant*

v.

UNION PACIFIC RAILROAD, *et al., Appellees*

Decided February 20, 1964

Before Wilbur K. Miller, Danaher and Wright, *Circuit Judges.*

Per Curiam: In the summer of 1963, the appellant unions and the appellee railroads had reached an impasse in their negotiations concerning proposed changes in working conditions, including the question whether firemen should be required on diesel-powered

locomotives in freight and yard service. In order to avoid a nation-wide strike which was threatened in consequence, Congress adopted a Joint Resolution,[1] approved August 28, 1963, creating an arbitration board to decide what disposition should be made of the issues about which the parties were unable to agree. The Board's award, said Congress, "shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues . . ."

After lengthy hearings, the Board made an award on November 26, 1963, with which the unions were dissatisfied. They filed these suits to impeach the award, as permitted by Section 9 of the Railway Labor Act, 45 U.S.C. § 159, which was made applicable by the Joint Resolution; they also attacked the Resolution as unconstitutional and asked preliminary injunctions against the enforcement of the award. The appellants in Nos. 18,331 and 18,332 filed a motion that a statutory three-judge court be constituted, in which the appellants in Nos. 18,333 and 18,334 did not join. The District Court denied the motion for a three-judge court, and disposed of cross-motions for summary judgment by granting that of the defendants, denying that of the plaintiffs, and dismissing the complaints. The unions appeal.

Error is charged in the denial of the motion for a three-judge court. The Brotherhood of Locomotive Firemen necessarily based the motion on its allegation that the Joint Resolution is unconstitutional and on its prayer that

> "Said defendants and said other carriers and persons be perliminarily enjoined and restrained from putting said award in effect until a hearing is had and a determination made by the Court of the right of the plaintiffs to a permanent injunction."

It is well understood that a plaintiff is not entitled to a three-judge court merely because he prays for an injunction against the enforcement of a statute he

[1] Public Law 88-108, 77 Stat. 129.

claims is unconstitutional. There must at least be an allegation that enforcement is threatened and therefore imminent. In this case, there was no such allegation; in fact, we were told the parties have stipulated that nothing would be done to effectuate the award before the termination of this litigation. There must also be substantial grounds for the charge that the statute is unconstitutional. In this case, there was none, as the District Court's opinion pointed out.

We have given meticulous consideration to the parties' voluminous briefs and extensive oral arguments, and have concluded that the opinion of District Judge Holtzoff is a correct and adequate disposition of the issues presented. On the basis of his opinion, 225 F. Supp. 11 (1964), we affirm his judgment.

It is so ordered.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part:* I agree with my colleagues that the award was in accordance with the governing statute, Public Law 88-108, 88th Cong., 1st Sess., 77 Stat. 128. The objections to the Board's actions which are here raised concern matters within its special competence.

However, I would reverse and remand so that a District Court of three judges may consider the constitutionality of the statute. It seems clear to me that the constitutional issues raised are substantial, and that, unless an injunction issues, the statutory scheme will continue in force prohibiting the unions from striking. P.L. 88-108, § 1. Thus a three-judge court is required. 28 U.S.C. § 2282.

The issue of constitutionality raised in these suits cannot be decided within the special review provided by the governing statute. That statute, 44 Stat. 595, 45 U.S.C. § 159, in providing for review by the District Court and this court of the Board's award, states:

"Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this chap-

ter for such awards, or that the proceedings were not substantially in conformity with this chapter;

"(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

"(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: * * *"

Neither unconstitutionality nor nonconformity with the laws of the land is listed as a ground for impeachment. Consequently, the statute prohibits consideration of constitutional issues in the special proceedings under it. Thus this statute differs from special review statutes which authorize consideration of whether an action is "in accordance with law" (*e.g.*, Revenue Act of 1936, ch. 690, § 906(g), 49 Stat. 1750; Agricultural Adjustment Act, 52 Stat. 63, 7 U.S.C. § 1366). Under such statutes, constitutional issues may be raised and decided. See *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 345 (1937); *Lee* v. *Roseberry*, E.D. Ky., 94 F. Supp. 324, 327 (1950) (three-judge court). Accord, *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 139 (1947); *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). Cf. *Eastern States Petroleum Corporation* v. *Rogers*, 108 U.S. App. D.C. 63, 280 F. 2d 611, *cert. denied*, 364 U.S. 891 (1960). No such authorizing phrase is contained in the statute here. 45 U.S.C. § 159, Third.

Moreover, the statute here apparently forecloses review by the Supreme Court in providing that "The determination of said court of appeals upon said questions shall be final." 44 Stat. 586, 45 U.S.C. § 159, Sixth. This provision raises the presumption that Congress did not intend constitutional issues to be considered within such a proceeding, for the intention to prohibit Supreme Court review of constitutional questions should not lightly be imputed to legislators sworn to uphold the Constitution. Compare *Eastern States Petroleum Corporation* v. *Rogers*, *supra*, 108 U.S. App. D.C. at 66, 280 F. 2d at 614, and cases there cited.

I conclude, therefore, that a three-judge court should have been empaneled to hear and decide the constitutional issues raised by plaintiffs.

APPENDIX I

Judgment in United States Court of Appeals for the District of Columbia Circuit

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this Court that the orders and judgment of the District Court appealed from in these cases are hereby affirmed.

It is Further Ordered by the court that a certified copy of the judgment of this court shall be issued Forthwith to the District Court.

Per Curiam

Dated: February 20, 1964

Circuit Judge Wright concurs in part and dissents in part.

Office Supreme Court, U.S.
FILED
APR 20 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS, REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT CARRIERS IN OPPOSITION

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT CARRIERS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is attached to the Petition for Certiorari as Appendix H. The opinions of the members of the Arbitration Board are printed in the Joint Appendix filed in *Brotherhood of Locomotive Firemen & Enginemen, et al.* v. *Certain Carriers etc.*, No. 935, 1963 Term, at pp. 31-132. In

addition, the opinion of the neutral members of the Board and the award of the Board were filed as Appendices I and II with the Brief for Respondent Carriers in Opposition in No. 935. The opinion of the District Court, 225 F. Supp. 11, is printed in the Joint Appendix at pp. 368-392 and also as Appendix C to the Petition for Certiorari in No. 935.

QUESTIONS PRESENTED

1. Whether Public Law 88-108 is unconstitutional for lack of adequate standards to guide the arbitrators.

2. Whether petitioner was deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States because of alleged inadequacies in the findings of fact by the Arbitration Board, because of an allegedly insufficient opportunity for petitioner to present its case to the Board, because of alleged inadequacy of judicial review, or because of the alleged infringement by the statute and the award of petitioner's collective bargaining rights.

3. Whether, for purposes of the three-judge court requirement of 28 U.S.C. 2282, either of the foregoing constitutional questions is "substantial."

4. Whether, under the three-judge court statute, one judge may dismiss a case for want of equity jurisdiction upon grounds apparent at the outset of the proceeding.

5. Whether petitioner was entitled to a three-judge court although it did not seek injunctive relief.

6. Whether the award of the Arbitration Board conformed to the requirements of Public Law 88-108.

STATEMENT

While petitioner's statement of the case is inaccurate in many respects, it is unnecessary to provide a detailed counter-statement since the relevant facts are set forth in the opinion of the neutral arbitrators, in the opinion of the District Court, and in the briefs in opposition of the carrier respondents and the government respondents in No. 935, 1963 Term, *Brotherhood of Locomotive Firemen & Enginemen et al. v. Certain Carriers etc.* (hereinafter referred to as "No. 935").

REASONS FOR DENYING THE WRIT

This petition adds nothing of consequence to the contentions made in No. 935, which have already been answered in the briefs in opposition filed by the respective respondents in that case. As was indicated in the carriers' response in No. 935 (p. 10 n. 5), the suit brought by this petitioner was a companion to that brought by the petitioners in No. 935. Plaintiffs in both cases challenged the award of Arbitration Board No. 282 on constitutional and statutory grounds that were substantially the same, and both lower courts disposed of the cases in sing[illegible] opinions. In these circumstances, we will rely for the most part upon the responses in No. 935, adding only a few additional comments where appropriate.

We wish to emphasize at the outset that every issue discussed in the petition relates to a statute that is applicable only in this particular labor dispute; that every issue has been resolved against petitioner by two lower courts after thorough consideration; and that petitioner points to no conflict of decisions among the Circuit Courts of Appeals. Thus it is evident that the decision in this case cannot substantially affect the

general administration of justice by the federal judiciary. In consequence, we submit that the case would not be worthy of review by this Court even if the decisions below were questionable. In fact, those decisions were clearly correct.

1. Petitioner raises the same constitutional contention as that raised by petitioners in No. 935, *i.e.*, improper delegation of legislative authority. The contention is insubstantial for the reasons given in the carriers' response (pp. 14-20) and the government's response (pp. 19-25) in that case.[1]

2. Petitioner's substantive due process arguments are without merit for the reasons given in the carriers' response (p. 15 n. 7) and the government's response (pp. 20-21) in No. 935.

3. Petitioner urges that a violation of the Fifth Amendment arose because of "the insufficiencies and irregularities of the proceedings leading to the award" (Pet. p. 33). Petitioner does not and cannot support this allegation on the record in this case. Rather, the record establishes, as petitioner conceded in a stipulation at the close of the Board proceedings, that those proceedings had been "fair and proper and that the rights of [the] clients [had] been respected" (J.A. 405).[2] Petitioner's contention is but the afterthought of a disappointed litigant.

---

[1] In this connection, it may be noted that the District Court correctly understood that petitioner, like petitioners in No. 935, had limited its constitutional argument to this single issue (J.A. 347-348, 332-333, 333-334; see also J.A. 271Z-10).

[2] The stipulation was made on behalf of petitioner by the attorney who, together with petitioner's present counsel, represented petitioner throughout the proceedings before the Board. See Vol. I, p. 2 of the transcript of the Board's proceedings.

4. Petitioner's objection respecting the alleged inadequacy of findings by the Board falls into the same category. Until now petitioner had never suggested that the opinion of the neutral members was not subscribed to by the concurring carrier members respecting every finding sustaining the award. Nor is such a suggestion tenable. See the separate statement of the carrier members (J. A. 90), the introductory paragraphs of the award itself (J.A. 9-11), and the opinion of the District Court (Pet. No. 935, App. C p. 13a). Petitioner's contention that the neutral members' opinion does not contain sufficient findings is equally frivolous (Pet. p. 34). As the District Court stated, that opinion is "comprehensive and well reasoned . . . [and] includes findings of fact" (Pet. No. 935, App. C p. 10a).

5. As to the proper scope of judicial review, as we pointed out in the carriers' response in No. 935 (pp. 12, 20 n. 12), the courts below tested the award by the substantial evidence standard—the very criterion urged by petitioner—and found it valid.[3]

6. Petitioner contends that the Board did not comply with the requirement of the statute respecting the incorporation in the award of matters as to which the Board found the parties had agreed. The lower courts, however, found that the Board did incorporate all such matters in the award (Carriers' Brief, No. 935, pp. 10-12). While petitioner evidently disagrees with the findings of the Board as to the existence of agreements and tentative agreements, both lower courts

[3] We assume *arguendo* that judicial review and findings of fact are constitutionally required. *Contra: Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 615-616.

held those findings were supported by substantial evidence. That, we submit, should be the end of the matter.

7. At some points petitioner appears to be attacking the merits of the award of the Arbitration Board. As the courts below correctly held, such contentions are not open to judicial review (Pet. No. 935, App. C, p. 13a). It may be added that an analysis of the provisions of the Award and of the opinion of the neutral arbitrators confirms the observation of the lower courts that the "board displayed extreme consideration and even benevolence for the future of employees in regular service" (*id.*, p. 15a). (See carriers' response in No. 935, pp. 8-10, for a discussion of the Award.)

8. This petition's lack of merit is further evidenced by petitioner's attempt to secure review on the basis of the three-judge court issue raised by petitioners in No. 935. It is well-settled that a three-judge court need not be convened where no injunctive relief is sought. *E.g., Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154-155. Petitioner did not seek any injunctive relief below. Although petitioner did include a prayer for a temporary restraining order and a preliminary injunction in its complaint (J.A. 271Z-10, 11), it did not pursue this relief when the hearing on the merits was expedited. See discussion in Carriers' Brief in No. 935, p. 29 n. 22. The only final relief it sought was "a judgment impeaching and vacating the Award of Arbitration Board No. 282" (J.A. 271Z-11). Accordingly, there was no basis for convening a three-judge court.

Petitioner now asserts that "[t]he district court was mistaken in attributing to petitioner the expression

of a view that 28 U.S.C. § 2282 is inapplicable to this case. . . ." (Pet. 39). Since the section *is* inapplicable, it does not matter whether or not petitioner expressed that view.

The District Court made no mistake, however. It stated that counsel for petitioner had "expressly and affirmatively declined to join in the application [for a three-judge court]" (Pet. No. 935, App. C p. 20a). This statement was based on the following unequivocal passage in the record:

> "Mr. Malin [Counsel for Petitioner]: Your Honor, speaking as counsel for the plaintiffs in 2921, I understand that the motion [for convening a three-judge court] made by counsel in 2919 would not in itself apply to 2921.
>
> "The Court: Not unless you join in it.
>
> "Mr. Malin: I do not join in it.
>
> "The Court: Very well." (J.A. 329)

CONCLUSION

For the reasons given above and for the reasons given in the responses of the carriers and the government in No. 935, we respectfully submit that the petition for certiorari should be denied.

J.R. WOLFE
Union Station Building
Chicago, Illinois

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C.

SIDLEY, AUSTIN, BURGESS & SMITH
1625 I Street, N.W.
Washington, D.C.

Of Counsel

FRANCIS M. SHEA
WILLIAM H. DEMPSEY, JR.
734 Fifteenth Street, N.W.
Washington, D.C.

RICHARD J. FLYNN
1625 I Street, N.W.
Washington, D.C.

Attorneys for Carrier Respondents

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS, THE UNITED STATES, THE ATTORNEY GENERAL, AND MEMBERS OF ARBITRATION BOARD NO. 282, IN OPPOSITION

Petitioner, a railroad labor organization, seeks review of the same decision of the court of appeals of which three other railroad labor organizations are seeking review in No. 935, *Brotherhood of Locomotive Firemen and Enginemen* v. *Certain Carriers, etc., et al.* The decision upheld the Award of the special arbitration board created by Public Law 88-108, 77 Stat. 132, to arbitrate two issues in the dispute between the nation's railroads and the railroad labor

728-926—64

organizations representing their operating employees: (1) the need for firemen on freight and yard locomotives, and (2) the composition of train crews. Unlike the petitioners in No. 935, however, the petitioner in the present case never sought a three-judge court, and expressly declined to join in the motion therefor (J.A. 329). Other than that, the issues raised in the two cases are basically the same, and most of petitioners' contentions in the present case are fully answered in our brief in opposition in No. 935. Accordingly, we answer here only those contentions not made in No. 935.

1. As we understand it, the main point of the petitioner's constitutional argument (Pet. 23–30), like that of petitioners in No. 935, is that Public Law 88–108 did not furnish the arbitration board adequate standards for the resolution of the two issues submitted to it for decision. For the reasons set forth in our brief in opposition in No. 935 (pp. 19–24), this contention is without substance.

In addition, petitioner suggests that the "partisan, nonrepresentative composition of the board" denied it "due process" of law (Pet. 33–34). But the balance of the decision-making power on the arbitration board was held by three disinterested neutral members, who were appointed by the President and were paid by the United States Government. Section 2, Public Law 88–108, 77 Stat. 132–133, Pet. App. 2a–3a. There was therefore no delegation of power to an interested majority "to regulate the affairs of an unwilling minority." Compare *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311.

Petitioner also argues that the Arbitration Board, after having found, on the basis of an adversary hearing in which petitioner took part, that more than 90 percent of all fireman positions are unnecessary (J.A. 54–58, 66–67), could not constitutionally provide that the actual designation of the individual positions on the basis of safety, adequate service, and burden of work (J.A. 12–13) should be made by the persons most directly affected, the railroads and representatives of the firemen, without the participation of the engineers (Pet. 30–31). But an engineer obviously has no constitutional right to participate in the determination whether he should have the assistance of a fireman on a particular run. See *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 533, 535–537. Indeed, petitioner cannot be serious about the claim for it is a reject of the separate craft units in which it, like other railway labor organizations, has bargained and arbitrated for over half a century.

2. Petitioner contends (Pet. 36–39) that in regard to the elimination of fireman (helper) issue, the Arbitration Board departed from its statutory obligations under Section 3 of Public Law 88–108, 77 Stat. 133 (Pet. App. 3a) to incorporate in its award "any matters on which it finds the parties were in agreement," and to give "due consideration to those matters on which the parties were in tentative agreement." On this aspect of the dispute, however, the Board found that there was neither "agreement" nor "tentative agreement," but only "hopeless disagreement on the

crucial questions" (J.A. 50–52, 61). This finding, as all the judges below agreed, was supported by substantial evidence (J.A. 135, 137–138, 150, 194, 214, 224).[1] The Board was therefore well within the limits of its authority in refusing to incorporate in its Award suggestions which had been discussed, but on which no agreement had been reached; and the courts below were clearly correct in so holding. In any event, since Public Law 88–108, 77 Stat. 132, has no application other than to the two issues as to which it provides for a determination binding for only two years, the statutory issues are not of sufficient general importance to warrant review by this Court.

CONCLUSION

For the reasons set forth above and in our brief in opposition in No. 935, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

APRIL 1964.

[1] Petitioner now asserts that, before the passage of Public Law 88-108, the parties "were close to an agreement" when they "were talking about a designation of some 16 per cent" as a limit of the firemen assignments to be eliminated (Pet. 29–30). The Arbitration Board found, however, that "there was absolutely no agreement by the carriers to the organizations' proposal that there should be an overall limitation on the number of firemen's jobs that might, for any reason, be eliminated" (J.A. 51–52). Indeed, the Secretary of Labor believed that the disagreement on this matter was one of the three major disagreements which separated the parties on the fireman (helper) issue (J.A. 136–137).

U.S. GOVERNMENT PRINTING OFFICE 1964

IN THE

Supreme Court of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION

1. Respondents do not challenge that the award on the key issue (which runs and which assignments locomotive engineers would be required to work without engine service assistants, commonly referred to as "firemen") did not derive any aid from any statutory policy or standards (Pet. 26); that it departed com-

pletely and without restraint from the pattern of interests which had been emerging from the history of bargaining and mediation (Pet. 29); that it rendered nugatory the manifest intent of the statute to preserve, prefer, and utilize the results of collective bargaining (Pet. 36); that, in providing a completely new solution for this key issue, it failed to make use of any mediation results of the Secretary of Labor (Pet. 37). To the contrary, carrier respondents and the courts below rely on the supposed absence of agreements on this key issue to justify a "start from scratch," a solution of the board's own invention (Pet. 18).

2. The respondent carriers did not challenge or answer the point that the board unconstitutionally redelegated statutory responsibility and deprived petitioner and employees represented by petitioner of their rights without due process of law (Pet. 30-32).

3. Concerning the matter of alleged concessions as to procedural due process, the sense of the stipulation as partially quoted in carrier respondents' brief (p. 4) is distorted. The stipulation expressly excepted matters on which objections had been raised during the course of the hearings; further it related to the oral hearings only and not to the subsequent steps and omitted steps (e.g., failure to provide for closing arguments or briefs, failure to provide for opportunity to inspect and comment on proposed findings and a proposed order); finally, at the time it was made the stipulation did not and could not contemplate that the end results would be improvised and would not flow from the matters covered by the hearings, insofar as the key issue is concerned (which runs and which assignments locomotive engineers would be required to work without engine service assistants).

4. Concerning the matter of alleged concession as to the inapplicability of 28 U.S.C. §2282, it was and remains petitioner's view that the question is entirely jurisdictional and that the district court should have required no motion to do what it was obligated to do *sua sponte* (see R. 668).

5. Concerning the proposed melding of the carrier members' opinion and of the neutral members' opinion for the purpose of synthesizing a majority opinion, examination of the two statements of opinion fails to substantiate that there was in fact agreement by a majority of the board on findings. Further, each separate statement of opinion fails to include subsidiary findings of fact made on the record before the board.

6. Reference is made to the briefs in opposition to the petition for a writ of certiorari in No. 935, in which it was alleged that there were negotiations looking toward the submission of the matters in dispute to voluntary arbitration. The implication appears to be intended that the compulsory arbitration was merely carrying out the basic intent of the parties. The facts are that no agreement for voluntary arbitration was ever concluded; that nothing came before the board from the Secretary of Labor or from any other source concerning such an agreement; that there is nothing in the record of this case that shows or can show that petitioner ever contemplated an agreement that would provide unfettered discretion to any third party to resolve matters in dispute; that, to the contrary, petitioner offered to prove in the courts below that its offer to engage in voluntary arbitration was conditioned on stipulations preserving the gains achieved in collective bargaining and mediation, and contemplated a predetermined result known in advance by the par-

ties (R. 656-658). In any event, the matter of voluntary arbitration was disputed in the courts below and could not have been decided on cross-motions for summary judgment (JA 27111, 276-277, 299-300). The opinions below did not rely at all on any supposed meeting of the minds on voluntary arbitration.

7. The reliance by the respondents (Car. Br., p. 5, n. 3; U.S. Br. No. 935, p. 21, n. 28) upon *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943) and *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 615-616 (1959) for the view that neither judicial review nor findings of fact are constitutionally required, is misplaced. Those cases did not, as here, involve a situation in which, without judicial review or findings, the court would be entering a judgment which would amount to nothing more than a rubber stamp of an award. Where a court is being asked to embody the decision of another body in the form of a judicial decree as required by Public Law 88-108 and Section 9, Fifth of the Railway Labor Act, the Constitution imposes the requirement that the court itself determine that its judgment is based on fair proceedings and rational results. Compare *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). The court cannot determine whether there were fair proceedings or rational results unless there are findings of fact made upon the record which it can review. See cases cited Pet. 34.

8. The Government's motion in opposition, page 2, equates the position of the petitioner to the rejection of separate craft bargaining. This is a misreading of the situation. The petitioner has been duly certified to bargain about the working conditions of the craft of locomotive engineers on most of the railroads in this case. It is rendered impotent to discharge its respon-

sibility in that the award without basis, without explanation, and in the face of the history of the dispute and the unchallenged evidence before the board that the locomotive engineers' safety and burden of work are most at stake, completely ousts petitioner from collective bargaining over vital working conditions of the locomotive engineers for a period of years. This is a deprivation of rights without due process of law.

9. The carrier respondents refer to the fact that the statutes whose validity and construction are questioned in this case apply only to a particular dispute. Immediately affected are 200,000 operating employees. Put at hazard is our system of free collective bargaining. The statute involved is an example of policy making and legislation by *ad hoc* boards. In the future, this example, if sustained, would be an attractive invitation to deadlock collective bargaining for the purpose of securing compulsory arbitration.

CONCLUSION

For the reasons set forth above and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

MAX MAYER
1250 Federal Bar Building
Washington, D. C. 20006

RUTH WEYAND
1316 Connecticut Ave., N. W.
Washington, D. C. 20036

Attorneys for Petitioner

April 22, 1963